

1990

Brent "W" Brown v. Geraldine K. Brown : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Lyle W. Hillyard; Hillyard, Anderson, and Olsen; Attorneys for Appellant.

Stephen W. Jewell; Attorney for Respondent.

Recommended Citation

Legal Brief, *Brown v. Brown*, No. 900450.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/3205

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT

KFU

45.9

.S9

DOCKET NO.

BRIEF

90 0450

IN THE UTAH SUPREME COURT

BRENT "W" BROWN,

Plaintiff/Appellant,

vs.

GERALDINE K. BROWN,

Defendant/Respondent.

*

*

*

*

*

Court of Appeals Case No.
890293-CA

900450
Priority No. 15

PETITION FOR WRIT OF CERTIORARI

Petition for Review of the Opinion
of the Utah Court of Appeals by
the Honorable Russell W. Bench, Judge
and Honorable C. Davidson,
Honorable Gordon K. Orme, Judges Concurring

STEPHEN W. JEWELL, 3814
15 South Main, Third Floor
First Security Bank Building
Logan, Utah 84321

Attorney for Defendant/Respondent.

LYLE W. HILLYARD, 1494
HILLYARD, ANDERSON & OLSEN
175 East 100 North
Logan, Utah 84321

Attorneys for Plaintiff/Appellant

FILED

SEP 28 1990

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	PAGE
QUESTION FOR REVIEW	1
REFERENCE TO COURT OF APPEALS OPINION	1
JURISDICTIONAL STATEMENT	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
NATURE OF THE CASE	3
COURSE OF PROCEEDINGS	3
DISPOSITION AT TRIAL COURT	7
DISPOSITION AT COURT OF APPEALS	8
STATEMENT OF FACTS	8
SUMMARY OF ARGUMENTS	12
ARGUMENT:	
I THE COURT OF APPEALS DECIDED THE ISSUE OF ATTORNEY FEES CONTRARY TO ITS OWN FINDINGS AND CONTRARY TO THIS COURTS PREVIOUS DECISIONS	13
CONCLUSION	19
APPENDIX	21

TABLE OF AUTHORITIES

Cases Cited

	PAGE
HUCK v. HUCK, 734 P.2d 417 (Utah 1986)	14
MUNNS v. MUNNS, 790 P.2d 116 (Utah App. 1990) . . .	17
OSGUTHORPE v. OSGUTHORPE, 791 P.2d 895 (Utah App. 1990)	17
SINCLAIR v. SINCLAIR, 718 P.2d 396 (Utah 1986) . . .	16
THROCKMORTON v. THROCKMORTON, 767 P.2d 121 (Utah App. 1988)	19

Statutes Cited

Utah Code Ann. (1953) Section 30-3-3	2
--	---

IN THE UTAH SUPREME COURT

BRENT "W" BROWN,

Plaintiff/Appellant,

vs.

GERALDINE K. BROWN,

Defendant/Respondent.

*

*

*

*

*

PETITION FOR
WRIT OF CERTIORARI

Court of Appeals Case No.
890293-CA

QUESTION FOR REVIEW

Defendant/Respondent, Geraldine K. Brown, by and through counsel hereby petitions the Utah Supreme Court for a Writ of Certiorari to review the decision of the Utah Court of Appeals, the Honorable Judges Bench, Davidson, and Orme, entered on or about August 31, 1990. Defendant requests this Court to review the following issue:

1. Is the Utah Court of Appeals Order vacating the trial court's award of attorney's fees and failing to award attorney fees on appeal in conflict with prior decision of the Utah Supreme Court, the Utah Court of Appeals, the generally sanctioned rule of law, and the Panel's own guidelines in light of the numerous other cases regarding award of attorney fees in divorce actions.

REFERENCE TO COURT OF APPEALS OPINION

The unpublished opinion of the Court of Appeals was issued on or about August 31, 1990. A copy thereof is

included in the appendix. Defendant only seeks this Court's review of the Court of Appeals ruling on attorney fees, both at trial and on appeal.

JURISDICTIONAL STATEMENT

The Order and Judgment which modified a 1986 Decree of Divorce previously entered was signed and entered by the First District Court, the Honorable VeNoy Christoffersen, on April 7, 1989. The Notice of Appeal to the Utah Court of Appeals was filed May 4, 1989. The Utah Court of Appeals issued its opinion on August 31, 1990. No rehearing has been requested. This Court has jurisdiction to review the decision in question by Writ of Certiorari by virtue of the Constitution of Utah, Article 8, Section 1, et seq., 78-2-1 et. seq. Utah Code Annotated 1953 as amended, and Rules 45 and 46 of the Utah Rules of Appellate Procedure.

STATUTORY PROVISIONS

The controlling statute in this action, Section 30-3-3, Utah Code Annotated, 1953, as amended. This section provides as follows: "The Court may order either party to pay . . . a sum of money . . . to enable such party to prosecute or defend [a divorce or modification] action."

STATEMENT OF THE CASE

NATURE OF THE CASE

This case is an action filed by Defendant, Geraldine K. Brown, to modify a Decree of Divorce, requesting an increase in child support and alimony as well as requesting attorney's fees for bringing this matter to court. Although technically a modification action, in reality the Court was requested to establish reasonable child support and alimony based on Plaintiff's historical and then current income due to the fact the Plaintiff was temporarily unemployed at the time of the original divorce hearing. Plaintiff had been re-employed earning a substantial income when the Petition to Modify was filed.

COURSE OF PROCEEDINGS

The Decree of Divorce was entered in the above-entitled matter on or about March 28, 1986. (Record Volume I ("R-I") p. 50)

Defendant filed her Petition to Modify Decree of Divorce on or about December 14, 1987. (R-I p. 87)

Interrogatories and Requests for Production of Documents were issued to Plaintiff on or about January 8, 1988. (R-I p. 106)

On or about August 31, 1988, the January 8, 1988 Interrogatories and Requests for Production of Documents still having not been answered, Defendant again filed a Second

Motion to Compel Discovery. (R-1 pp. 133-138) Defendant had filed numerous objections to Plaintiff's requests for extension of time.

Plaintiff's then acting attorney, Lyle W. Hillyard HILLYARD, ANDERSON & OLSEN, filed a withdrawal of counsel on or about September 2, 1988. (R-1 p. 140)

On or about September 20, 1988, the Court granted Defendant's Motion to Compel Discovery, allowing 10 days to comply with the discovery order and further ordered that Attorney Hillyard's withdrawal would not be recognized until a notice in writing was furnished to the Court from Plaintiff personally indicating that Plaintiff had terminated the attorney-client relationship. (R-1 p. 142) No written notices were ever provided by Plaintiff.

Plaintiff's trial attorney, Richard B. Johnson, entered his appearance on or about September 29, 1988. (R-1 p. 145)

Partial Answers to Defendant's First Set of Interrogatories and Responses to Defendant's Requests for Production of Documents were issued on or about October 3, 1988. (R-1 pp. 147-227)

Defendant issued a Notice of Readiness for Trial on or about October 11, 1988. (R-1 p. 278)

On or about October 25, 1988, a hearing on the Petition was set for January 17, 1989. (R-1 p. 230)

On or about November 8, 1988, Defendant again filed a Motion to Compel Discovery (actually the third such formal motion) requesting the Court to order Plaintiff to answer

Interrogatories and Requests for Production not fully responded to in Plaintiff's October 3, 1988 responses. (R-I pp. 232-242)

No responses to Defendant's Motion to Compel being received by the Court, the Court granted Defendant's Second Motion to Compel Discovery on or about December 7, 1988. (R-I pp. 243, 247)

On or about December 14, 1988, Defendant filed her Answer to Plaintiff's Interrogatories. The documents attached to Defendant's Answers to Plaintiff's Interrogatories were referred to extensively in the trial of this matter. (R-II pp. 1-16)

On or about December 16, 1988, Plaintiff filed his Memorandum of Points and Authorities in Opposition to Defendant's Second Motion to Compel Discovery. (R-II pp. 19-23)

Plaintiff provided some additional information at that time. (R-II pp. 62-85)

On or about December 27, or more than two months after the trial date had been set, Plaintiff filed a Motion for Continuance of the January 17, 1989 trial date. (R-II pp. 92-95)

On or about January 3, 1989, the Court issued its Order for Default upon Defendant's request, in that Plaintiff had failed to respond to Defendant's Second Motion to Compel Discovery on or before December 23, 1988, as ordered by the Court on or about December 15, 1988. Plaintiff's Answer and

Counter-Petition were ordered to be stricken and the Clerk was ordered to enter Plaintiff's Default on the Petition to Modify the Decree of Divorce. (R-II pp. 97-104)

Depositions were held on or about January 4, 1989.

On or about January 5, 1989, Defendant filed an Objection to Plaintiff's Motion for Continuance of Trial. (R II p. 105) Defendant reminded the Court of Plaintiff's numerous delays.

No Order continuing the trial was ever entered by the Court. However, in a telephone conference with the Clerk's Office, the Clerk indicated that the Court had denied Plaintiff's Motion to Continue the trial and that the trial was still scheduled for January 17, 1989.

On January 17, 1989, Defendant appeared in person, and with counsel and necessary witnesses for the trial. Plaintiff's counsel, Richard B. Johnson was present and indicated that Plaintiff was not available because he left the country for vacation in South America. After discussion with counsel in the Judge's chambers, the trial was continued to February 28, 1989. (R-I p. 246) Defendant's counsel, though not on the record, objected to the continuance indicating to the Court that the continuance would be prejudicial to Defendant unless the Court made its Order retroactive to the date of the filing of Defendant's Petition to Modify.

Trial on the Petition to Modify was held on February 28, 1989, before the Honorable Judge VeNoy Christoffersen.

The Court's Memorandum Decision was issued on or about March 3, 1989, granting Defendant's Petition to Modify and increasing child support from \$300.00 per month per child to \$700.00 per month per child, increasing alimony from \$200.00 per month to \$500.00 per month and awarding \$3,000.00 attorney fees. Defendant had offered testimony of her need for attorney's fees and ability to pay and had requested \$4,000.00 in attorney's fees. (R-II pp. 138-141)

Notice of Withdrawal of Counsel was filed by Plaintiff's attorney, Richard B. Johnson, on or about March 30, 1989. (R-II p. 142)

Findings of Fact and Conclusions of Law and an Order and Judgment on the Petition to Modify were filed with the Court on or about March 30, 1989, and signed by the Court on or about April 7, 1989. (R-II p. 145-154)

Notice of Entry of Judgment was issued on or about April 19, 1989 (R-II p. 155)

Notice of Appeal was issued by Lyle W. Hillyard, HILLYARD, ANDERSON & OLSEN, attorneys for Plaintiff, on or about May 4, 1989. (R-II p. 157)

The Court of Appeals issued its decision August 31, 1990, remanding the case for more adequate findings of fact and reversing the trial court's award of attorney fees. The Court of Appeals did not award costs or fees on appeal.

DISPOSITION AT TRIAL COURT

The Court issued a Memorandum Decision granting Defendant's Petition to Modify the Decree and awarding child

support for two children at \$700.00 per month per child and alimony at \$500.00 per month. The Court had earlier, during the trial, denied Defendant's petition to require Plaintiff to pay approximately \$4,000.00 for costs incurred related to the home awarded to Defendant in the original divorce. That order is not appealed.

The Court ordered that the modification of child support and alimony be effective as of January 17, 1989, the date first scheduled for trial of the Petition to Modify.

Defendant was also awarded \$3,000.00 as attorney's fees and costs.

DISPOSITION AT COURT OF APPEALS

The Court of Appeals remanded the case to the trial court to enter more adequate findings or to take additional evidence, as may be needed on the issues of child support and alimony.

The Court of Appeals also vacated the trial court's order on attorney's fees with no costs or fees awarded on appeal.

STATEMENT OF FACTS

1. The parties were divorced by a Decree of Divorce on March 28, 1986.

2. Immediately prior to the trial, or through November of 1985, Defendant was employed at Integrated Systems Engineering, Inc., a company originally founded by Plaintiff

and two other individuals, and subsequently sold. (TT p. 119, 1. 16 - p. 21, 1. 10)

3. Brent Brown's gross income from wages, salaries, and interest in 1985, the year just prior to the divorce, exceeded \$147,000.00. (TT p. 22, 1. 20 - p. 23, 1. 2) (See also page 1 of Plaintiff's Exhibit No. 1 in Addendum 5.)

4. During the Court's bench ruling in the original divorce, the Court indicated that due to Plaintiff's apparent ability to earn a substantial income, and his testimony that he was not now employed, it was necessary to impute an income figure in order to establish child support. The Court arbitrarily chose a figure of \$54,000.00 per annum and established child support at \$300.00 per month per child for three children. (TT p. 3, 1. 22, to p. 4, 1. 11) (See also copy of Reporter's Transcript of Court's Bench Ruling, R-II pp. 127-134) The Court then reviewed its concerns with both counsel regarding establishing alimony. The Court stated:

. . . the NELSON I think is the latest one out -- recites all of those factors you talk about on alimony and the purpose of it, and it is to maintain as close as you can the same standard of living after divorce as before the divorce with factors of needs on one hand and ability to pay on the other.

The ability at the present time to pay, of course, is not there, but I assume it will be in the future, and the court can, of course, on any change of circumstances, as you know, take that into account; but I will award alimony that can be changed on any change in the situation of income and I'll award \$200.00 a month alimony. That's, as you understand, where there's a substantial change in circumstances this can be brought back if you can't agree on what that then should be. And certainly it would be a substantial change of

circumstances to go from zero income to, say, \$60,000.00 a year or \$25,000.00 maybe. (TT p. 4, l. 13 to p. 5, l. 4.) (See also R-II p. 129 l. 22 - p. 130 l. 13.)

5. Pursuant to Plaintiff's 1986 Federal Income Tax Return, Plaintiff's income from wages, salaries, interest, dividends, and severance pay, in 1986 was \$51,350.00. (Plaintiff's Exhibit 2) (See also page 1 of Plaintiff's Ex. 2 in Addendum 5)

6. Plaintiff's 1987 Federal Income Tax Return indicated income from wages, salaries, interest, dividends, and rents in excess of \$140,000.00. (Plaintiff's Exhibit 3) (See also page 2 of Plaintiff's Ex. 3 in Addendum 5)

7. Plaintiff's personal financial statement to Zions First National Bank dated September 15, 1988, approximately five months prior to trial, indicated Plaintiff's income to be \$130,000.00 per year with total liabilities of \$56,000.00 and total net worth of \$1,157,000.00. (Defendant's Exhibit 3) (See also in Addendum 5)

8. Plaintiff's net worth at or about the time of the divorce was approximately \$430,000.00. (computed from Findings of Fact, R-I pp. 47-48)

9. Defendant's income for the three years in question was as follows:

YEAR	INCOME
1986	\$26,406.00
1987	\$28,734.00
1988	\$21,785.00

(See R-II, p. 7 Also Addendum 6)

10. Defendant's expenses for the three years in question were as follows:

YEAR	EXPENSES
1986	\$29,385.00
1987	\$28,523.00
1988	\$25,500.00

(See R-II, p. 7-8. Also Addendum 6)

11. Defendant's net income after expenses for the three years in question was:

YEAR	NET INCOME
1986	\$- 2,979.00
1987	211.00
1988	- 3,715.00

(See R-II, p. 7. Also Addendum 6)

12. Defendant's net worth as of the date of trial is approximately \$431,368.00 (See R-II, p. 13. Also Addendum 6)

13. Brent Brown purchased Integrated Systems Engineering ("ISE") in or about November of 1986. The sale was completely voluntary. (R-II pp. 25-85)

14. ISE is wholly owned by Brent Brown. (TT p. 26, 1. 9-10)

15. The total equity of ISE on or about January 31, 1988, was approximately \$1,032,000.00. (Defendant's Ex. 2, Addendum 5)

16. Defendant's attorney's fees were approximately \$4,000.00, incurred mostly because of Plaintiff's refusal to cooperate in the action.

17. Defendant's only assets are her home, furniture, automobile, and investments necessary to produce a small

amount of income. Any reduction in income producing assets also reduces the income available to Defendant.

18. Defendant's income from all sources, including child support and alimony, does not even cover her living expenses, which Defendant has had to maintain at a very modest level.

SUMMARY OF ARGUMENTS

1. The Court of Appeals' decision vacating the trial court's award of attorney fees and failing to award attorney fees on appeal is in conflict with the decisions of the Utah Supreme Court and other panels of the Court of Appeals. Rather than leaving the decision regarding attorney fees to the sound discretion of the trial court based on need and ability of each party, the disposition at trial and the conduct of the parties, the panel has ruled that Defendant can only be awarded attorney fees if she has no ability whatsoever to cover the costs of litigation. Basically, Defendant must be indigent to be awarded attorney fees. Furthermore, the Panel's decision has completely departed from the accepted course of judicial proceeding in the issue of awarding attorney fees in a divorce action, which has always treated attorney fees as a marital debt to be divided based on need and ability of each party to pay. The Panel also failed to follow its own guidelines in failing to detail the facts upon which the Panel reversed its decision. The Panel only stated, "In light of Appellee's significant assets . . ." What assets is the Panel referring to?

ARGUMENTS

I.

THE COURT OF APPEALS DECIDED THE ISSUE
OF ATTORNEY FEES CONTRARY TO ITS OWN
FINDINGS AND CONTRARY TO THIS COURTS
PREVIOUS DECISIONS.

The Supreme Court of Utah, the Court of Appeals, and, to the knowledge of Defendant's attorney, the First District Court, have all been consistent in awarding attorney's fees in divorce actions. Attorney's fees are awardable in the trial court's discretion based upon the need of the requesting party, the reasonableness of the fees requested and the necessity of the fees. The question in this action is what constitutes "need" on the part of the Defendant and who should determine that need, the trial court who heard a full day's evidence or the Court of Appeals based on an inanimate record?

The panel in this action has determined that Defendant has significant assets and is therefore not in need of assistance to cover her attorney's fees. The panel neglected, however, to specify what "significant assets" the panel is referring to, contrary to its own decision requiring the trial court to formulate specific findings to support its decision. We, therefore, have no idea what significant assets the panel is referring to. The panel further indicates that in order to be awarded attorney's fees, Defendant, "in essence, . . . must show that she would be 'unable to cover the costs of litigation.'" Basically, the panel is requiring Defendant to

be indigent to be awarded attorney's fees, which is absolutely contrary to prior orders of this Court and other decisions in the Court of Appeals.

In HUCK v. HUCK, 734 P.2d 417, (Utah 1986) this Court reaffirmed the standard for awarding attorney's fees, and stated:

In divorce cases, an award of attorney's fees must be supported by evidence that it is reasonable in amount and reasonably needed by the party requesting the award. BEALS v. BEALS, 682 P.2d 862 (Utah 1984). Plaintiff contends that there is no evidence to support a finding of financial need on the part of defendant to justify the award of fees to defendant. He presented evidence that her total income from all sources including support payments totaled \$1,795.00 per month and that therefore she should be capable of bearing the costs of litigation.

However, defendant had no liquid assets and even using plaintiff's figures as to her gross income from all sources, her income barely covered her expenses. Her attorney testified at trial as to the reasonableness of the time spent and fees charged. The trial court awarded her less than one-third of the amount she sought. She met her burden of showing financial need and provided evidence that the fees awarded to the plaintiff (\$2,750) were reasonable.

In the instant action, the uncontroverted evidence clearly indicates that Defendant's current living expenses greatly exceed her current income. In 1988 alone, her expenses exceeded her income by more than \$3,700.00, or more than the attorney's fees awarded by the trial court. Even with the child support and alimony award as modified and ordered by the trial court, Defendant's income is substantially lower than Plaintiff's income.

Although Defendant has some assets which could be liquidated to pay her attorney's fees, any liquidation of

assets also impacts negatively on her income. Defendant's only assets are her home, furniture, automobile, and her income producing investments. The uncontroverted testimony at trial was that Defendant's net worth had diminished since the time of the divorce while Plaintiff's net worth had almost tripled, to nearly \$1,200,000.00.

At trial, Defendant's counsel submitted an Affidavit of all attorney's fees which was accepted by Plaintiff and stipulated to by Plaintiff as being reasonable. Defendant's attorney testified as to the reasonableness of the fees, the amount, and the necessity of the fees, and the need for time spent on the case. Although Plaintiff had no questions regarding the testimony of Defendant's attorney, Plaintiff's counsel did indicate that he did not believe that Defendant had established sufficient factors to merit an award of attorney's fees. The exchange between the parties was as follows:

Mr. Johnson: I don't have any questions. Except that under the case law, counsel has not established a foundation for [an] award of attorney's fees. We would object to the Affidavit on that basis.

. . .

The Court: Where is the foundation lacking?

Mr. Johnson: He has to establish need on behalf of his client. You know he's got to have testimony relative to what's reasonable. Just the standard guidelines out of the latest case.

The Court: Yes, he testified himself, I assume that

Mr. Johnson: My client then testifies relative to attorney's fees.

The Court: She testified as to a need.

Mr. Johnson: Then I didn't hear that.

The Court: I did.

Mr. Johnson: I just missed it.

(TT p. 134 125- p. 135 121)

The trial court specifically held that Defendant had established a need for attorney's fees. Judge Christoffersen in his Memorandum Decision stated:

Defendant is also asking attorney's fees for this. Section 30-30-3 of the U.C.A. has been interpreted to include actions for modification. See KALLAS v. KALLAS, 614 P.2d 641. Plaintiff's ability to pay attorney's fees is obviously much greater than that of Defendant, Defendant only having income that she realizes from investment of funds she received from the divorce plus her child support and alimony. Defendant's counsel testified as to the hours and necessity of the amount of hours for the purpose of this hearing and the reasonableness of his hourly fee with a figure of around \$4,000.00 attorney's fees. However, in checking over this exhibit showing the amount of time spent, mainly concerning the cost of the curb and gutter. The Court feels there were some items which were not necessary and therefore reduced the attorney's fees award to \$3,000.00 opposed to \$4,000.00, plus costs. (H.D. p.4)

Prior decisions of this Court and the Court of Appeals are very consistent that attorney's fees are awardable at the discretion of the trial court based on need and reasonableness. For example:

In SINCLAIR v. SINCLAIR, 718 P.2d 396 (Utah 1986), this court stated:

The award of attorney's fees was proper where the record showed defendant's need based upon the fact that her monthly expenses exceeded her monthly income and the attorney testified as to the reasonableness of his fees. 718 P.2d at 398

In OSGUTHORPE v. OSGUTHORPE, 791 P.2d 895 (Utah App 1990), the Utah Court of Appeals stated:

Defendant claims plaintiff has sufficient means to pay her attorney fees incurred on appeal in light of the court's findings that plaintiff is capable of finding good, gainful employment, the award of alimony and child support, and the property distribution. However, the trial court found that plaintiff did not have the ability to pay her attorney fees incurred at trial and that defendant should pay a portion of plaintiff's attorney fees. Because those findings are supported by the evidence we award plaintiff her costs and reasonable attorney fees incurred on appeal and remand to the trial court for determination of reasonable attorney fees plaintiff has incurred on appeal. 791 P.2d 896

In MUNNS v. MUNNS, 790 P.2d 116 (Utah App 1990), the Court of Appeals declined to award attorney's fees, again deferring to the court's discretion, the court stated:

Appellant alleges that the trial court abused its discretion by failing to award her attorney's fees. She states that she should have been awarded attorney fees because the record is replete with evidence that she is in dire need of financial assistance, having no income other than alimony and child support and no liquid assets or marketable skills, while respondent has a steady job and liquid assets. On the other hand, respondent alleges that appellant did not demonstrate need because her property is virtually debt-free and she would be receiving a \$9,000.00 judgment over the space of two years from which she could pay the attorney fees.

To recover attorney fees in a divorce action, the moving party must show evidence (1) establishing the financial need of the requesting party, and (2) demonstrating the reasonableness of the amount of the award. [citations omitted] Where either of these two factors have not been shown, we have reversed awards of attorney fees. [citations omitted]

The parties both succeeded in establishing their respective financial need, and the attorney presented evidence demonstrating the reasonableness

of their respective fees. Therefore, the trial court would have been justified in awarding either party attorney fees. However, while the trial court may award attorney fees in divorce proceedings, pursuant to Utah Code Annotated Section 30-3-3 (1989) [citation omitted] the decision to award attorney fees lies primarily within the trial court's sound discretion. [citations omitted] Under the present circumstances, in which either party reasonably has the ability to pay the other party's attorney fees, we do not find that the trial court abused its discretion in ordering each party to pay his or her own attorney fees. 790 P.2d at 122, 123 [emphasis added]

It has further been the common practice of the current judges in the First District, the Honorable Gordon J. Low and the Honorable F. L. Gunnell, to treat both parties attorney fees in a divorce action essentially as marital debts and to award attorney fees based on a review and percentage of each party's income in order to establish need. To assist counsel in reviewing the issue of attorney fees in order to settle divorce actions, the First District Judges have indicated that they, based on the evidence and needs of each specific action, will generally compare the income of the potential paying party, less support and alimony, to the income of the proposed receiving party, including child support and alimony, and to allocate total attorney fees incurred based on the percentage difference of the parties' adjusted income.

Neither the trial court, the prior decisions of the Utah Supreme Court, nor the Utah Court of Appeals require one party to show that he or she is totally without means to pay attorney's fees to be entitled to an award of attorney's fees.

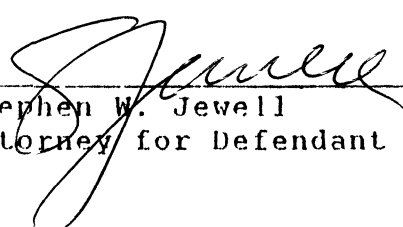
In the instant action, the trial court, in exercising its discretion after hearing considerable testimony and dealing with numerous other issues in this case prior to the hearing, awarded Defendant \$3,000.00 in attorney's fees based on the fact that her expenses greatly exceeded her income, that Plaintiff's income greatly exceeded Defendant's income, and that Defendant should not be required to liquidate assets to pay the attorney fees. The Court of Appeals can only vacate the award of attorney fees if there are no facts to support the trial court's decision. *THROCKMORTON v. THROCKMORTON*, 767 P.2d 121 (Utah App. 1988). The Court of Appeals' decision is not only contrary to prior case law on attorney fees, but is inappropriate in failing to follow the proper standard of review on appeal.

CONCLUSION

Judge Christoffersen properly determined that Defendant was in need of assistance in paying her attorney fees. The Court of Appeals, however, without specifically indicating what assets were available, ruled that Defendant could only be awarded attorney fees if she were indigent. Defendant is certainly unable to cover the costs of the litigation and the Panel's decision is incorrect and inconsistent with prior case law and the usual course of judicial proceedings.

Defendant respectfully requests this Court to grant this Petition for Writ of Certiorari to consider the correctness of the Court of Appeal's decision regarding attorney fees, both at trial and on appeal.

DATED this 28 day of September, 1990.

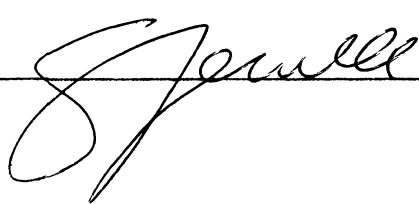


Stephen W. Jewell
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 28 day of September, 1990, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI to the following persons, postage pre-paid thereon, by depositing the same in the United States Mail.

Lyle W. Hillyard
HILLYARD, ANDERSON & OLSEN
175 East 100 North
Logan, UT 84321



APPENDIX

- TAB 1. Opinion of the Utah Court of Appeals dated
August 31, 1990.
- TAB 2. Memorandum Decision of Trial Court dated
March 3, 1989.
- Findings of Fact and Conclusions of Law dated
April 7, 1989
- Order and Judgment dated April 7, 1989.

TAB 1. Opinion of the Utah Court of Appeals dated
 August 31, 1990.

FILED

IN THE UTAH COURT OF APPEALS

-----00000-----

AUG 31 1990
Gary [Signature]
CLERK

Brent W. Brown,)	
)	
Plaintiff and Appellant,)	OPINION
)	(Not For Publication)
v.)	
)	
Geraldine K. Brown,)	Case No. 890293-CA
)	
Defendant and Appellee.)	

First District, Cache County
The Honorable VeNoy Christofferson

Attorneys: Lyle W. Hillyard, Logan, for Appellant
Stephen W. Jewell, Logan, for Appellee

Before Judges Bench, Davidson, and Orme.

BENCH, Judge:

Appellant Brent W. Brown appeals an order that modified his decree of divorce by increasing the amount of alimony and child support payments he is to pay to appellee. Appellant claims that the trial court abused its discretion in increasing alimony and child support payments when (1) the appellee failed to meet her burden of showing a substantial change in circumstances necessitating the increase, (2) the appellee produced no evidence of a necessity for the increases or of her inability to aid in her own and the children's support, and (3) the trial court made no findings regarding necessity and ability.

FINDINGS OF FACT

It is reversible error if a trial court fails to make findings on all material issues unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983). These findings "should be sufficiently detailed and include enough subsidiary facts to disclose the

steps by which the ultimate conclusion on each factual issue was reached." Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987) (quoting Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979)). The trial court's findings in the present case do not include sufficient detail for us to determine what steps it took in reaching its conclusions as to the material issues that must be considered prior to modifying a divorce decree. In fact, the findings are so sparse we do not know if the material issues were even considered.

"The threshold requirement for relief [in a petition to modify a divorce decree] is a showing of a substantial change of circumstances occurring since the entry of the decree and not contemplated in the decree itself." Naylor v. Naylor, 700 P.2d 707, 710 (Utah 1985). In the present case, the trial court failed to make any specific findings on appellant's ability to pay, which is the alleged substantial change in circumstances. In particular, the trial court's determination that appellant's income was somewhere within a very broad range was insufficient to establish appellant's income--a critical factor in determining the larger question of his ability to pay. Because we do not know the factual basis for the trial court's conclusion that a substantial change in circumstances had occurred, we cannot determine whether appellee met her burden of proving this threshold requirement. Nor can we determine whether the trial court abused its discretion in so finding.

In awarding alimony, the trial court must consider each of the following three factors: "(1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income for him or herself; and (3) the ability of the responding spouse to provide support." Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah Ct. App. 1987). In the present case the trial court failed to make specific findings concerning any of these factors. In particular, the trial court made no findings as to appellee's ability to work. See, e.g., Higley v. Higley, 676 P.2d 379, 382 (Utah 1983). The record is also "void of any facts as to [appellant's] or [appellee's] monthly expenses which are relevant both to [appellee's] 'need' and [appellant's] ability to pay." Throckmorton, 767 P.2d at 125. Again, we are unable to determine whether the trial court's order increasing alimony was within its discretion because we do not know upon what factual basis it rests.

In determining child support the trial court must consider the following factors enumerated in Utah Code Ann. § 78-45-7(2) (1987):

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the need of the obligee;
- (f) the age of the parties;
- (g) the responsibility of the obligor for the support of others.

Failure to consider these statutory factors is an abuse of discretion. Durfee v. Durfee, 140 Utah Adv. Rep. 42, 43-44 (Ct. App. 1990). The trial court in the present case has not indicated that it considered any of these statutory factors. We are therefore precluded from reviewing the merits of its award.

The trial court failed to make adequate factual findings concerning the substantial change in circumstances and the other material factors identified above. Inasmuch as the record is not clear and uncontroverted and capable of only supporting the trial court's award of increased alimony and child support, we vacate the trial court's order and remand for further proceedings to take additional evidence on these factors, as needed, and for entry of findings concerning each factor identified above and any other material factor which may arise. While we do not approve or disapprove of the amounts awarded by the trial court, we do caution that "[w]e do not intend our remand to be merely an exercise in bolstering and supporting the conclusion already reached." Allred v. Allred, 141 Utah Adv. Rep. 14, 16 (Utah Ct. App. 1990).

ATTORNEY FEES

Appellee was awarded attorney fees by the trial court based on the difference in earning ability of the parties. Appellant argues that this was an abuse of the trial court's discretion in that appellee failed to prove that she was in financial need.

Before a trial court may award attorney fees in a divorce matter, the requesting party must show that award of attorney

fees is "reasonably needed by the party requesting the award." Huck v. Huck, 734 P.2d 417, 419 (Utah 1986). In essence, appellee must show that she would be "unable to cover the costs of litigation." Kerr v. Kerr, 610 P.2d 1380, 1384 (Utah 1980).

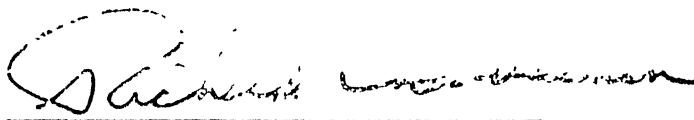
The trial court, however, erroneously concluded that attorney fees were warranted because "[p]laintiff's ability to pay attorney fees is obviously much greater than that of defendant."

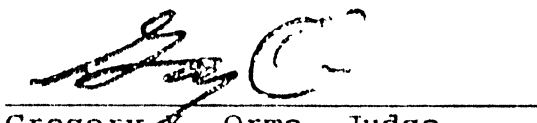
In support of the trial court's conclusion, appellee cites Andersen v. Andersen, 757 P.2d 476, 480 (Utah Ct. App. 1988) for the proposition that disparity between the parties' abilities to pay is a sufficient ground upon which to find need. We note, however, that in Andersen the "plaintiff testified that she had no means with which to pay her fees." Id. at 480 (emphasis added). Appellee, on the other hand, has significant means with which to pay her fees. Cf. Huck, 734 P.2d at 420 (granting of attorney fees when party had no "liquid assets").

In light of appellee's significant assets, we find that she failed to meet her burden of proof that she reasonably needed the award. We therefore vacate the trial court's award of attorney fees. No cost or fees awarded on appeal.


Russell W. Bench, Judge

WE CONCUR:


Richard C. Davidson, Judge


Gregory K. Orme, Judge

TAB 2. Memorandum Decision of Trial Court dated
 March 3, 1989.

 Findings of Fact and Conclusions of Law dated
 April 7, 1989

 Order and Judgment dated April 7, 1989.

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

BRENT "W" BROWN,

)

Plaintiff

)

MEMORANDUM DECISION

v.

)

Civil No. 24569

GERALDINE K. BROWN,

)

Defendant

)

The parties were divorced in March of 1986. The Plaintiff prior to divorce was a partner in a company called Intergrated Systems Engineering which he later sold and was taken on as an employee by the purchaser. Testimony indicated that the year prior to the divorce when he was in this situation his income was \$100,000.00+ annually. At the time of the divorce, his income was zero having terminated any employment. At that time, based on the prior track record of the plaintiff, indicated that he was not going to remain at zero income and indicated that he had the ability to generate income.

The Court estimated an income of at least historically of \$54,000.00 minimum. An alimony order of \$200.00 per month was granted based upon that projection and \$300.00 per month per child support for three children. It was estimated that he would soon be making again substantial monies was correct and was a conservative estimate because the evidence shows that the year after his divorce he purchased Intergrated Systems Engineering himself and his own personal financial statement submitted to a bank in September,

1988 he declares now a net worth of \$1,157,000.00 and an annual income of \$130,000.00 per year.

The defendant has filed a Petition based on this change of circumstances for an increase in child support and alimony. Defendant has submitted as Exhibit 4, a financial statement updated from the September 1988 Financial Statement he submitted to the bank in which he declares his monthly income of \$10,000.00 per month as only \$6,000.00. The Court recognizes that financial statements submitted to banks for purposes of loans are probably inflated and that financial statements submitted to the Court in divorce actions are probably deflated, and the figure is somewhere inbetween.

The Court finds that in any event that there is a substantial change of circumstances in the defendant's income and it does not appear simply to be coincidental that his income the year before his divorce was in the \$100,000.00+ category annually and no income at the time of divorce and then two years later his income is in the \$130,000.00 range at least so reflected on the statements submitted to the bank last September.

The Plaintiff testified that there was several reasons for the decrease in his projected earnings in September, 1988 and his now present financial declaration. Mainly being the type of business he has and the necessity of liquidation of assets and the necessity of decreasing his own income monthly because of the business problems. He eliminated his bonuses, and has liquidated his stocks wherein he had formerly received interest and dividend income. If

this was because of the Petition for Modification was filed of course is not known and the Court will not assume that to be the case. However, the Court feels his present financial declaration which is his Exhibit 4, is more conservative than his actual income. The Court feels that the \$130,000.00 on his financial statement of September 1988 which is defendant's Exhibit 3 is probably inflated.

The Court will depart from the established guidelines because of the factor of the debt structure that was testified to by the plaintiff in his business that he now solely owns but will use the \$72,000.00 September figure deducting therefrom the bonus commission and dividend income and arrive at a figure of \$700.00 per month per child as the modified order on child support payments. The Court feels this is equitable taking into account the debt structure of Integrated Systems Engineering from where he received his income. As factors on alimony you have to take into account his increased ability to provide the standard of living that is now comparable with his income taking into account those factors listed in the English case, the Jones case, and the Nelson case, taking into account to try to maintain as close as you can the same standard of living at this time as was available before and an ability at the present time to pay and the needs of the defendant. The Court will therefore increase the alimony award to \$500.00 per month.

Defendant is also asking attorney's fees for this. Section 30-3-3 of the U.C.A. has been interpreted to include actions for

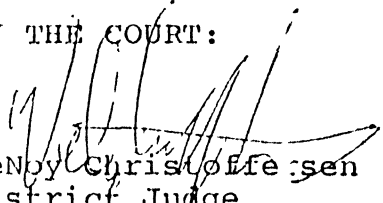
Brown v. Brown
Civil No. 24569
Page Four

Modification. See Kallas v. Kallas, 614 P.2nd 641. Plaintiff's ability to pay attorney's fees is obviously much greater than that of the defendant, the defendant only having the income that she realizes from investment of funds she received from the divorce plus her child support and alimony. Defendant's counsel testified as to the hours and the necessity of the amount of hours for purpose of his hearing and the reasonableness of his hourly fee and with the figure of around \$4,000.00 attorney's fees. However in checking over his Exhibit showing the amount of time spent, namely concerning the cost of the curb or gutter. The Court feels there are some items that were not necessary and has therefore reduced the attorney's fees award to \$3,000.00 as opposed to \$4,000.00 plus costs.

Counsel for defendant to prepare the appropriate modification order.

Dated this 3 day of March, 1989.

BY THE COURT:


Venoy Christoffe
District Judge

Stephen W. Jewell, 3814
Attorney at Law
15 South Main, Third Floor
First Security Bank Building
Logan, Utah 84321
Telephone: (801) 753-2000

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

BRENT "W" BROWN,	*	
Plaintiff,	*	FINDINGS OF FACT AND
	*	CONCLUSIONS OF LAW
vs.	*	
GERALDINE K. BROWN,	*	
Defendant.	*	Civil No. 24569

This matter came on hearing before the Court, the Honorable VeRoy Christoffersen presiding, on January 17, 1989 and again on February 20, 1989. Defendant was present and represented by counsel, Stephen W. Jewell. Plaintiff was present only on February 28, 1989, and represented by counsel on January 17, 1989, and February 28, 1989. The Court having heard the evidence and testimonies presented and the arguments of counsel, and being fully advised in the premises, now finds and concludes as follows:

FINDINGS OF FACT

1. The parties were divorced on or about March 18, 1986.
2. Prior to the divorce, Plaintiff was a partner in a company called INTEGRATED SYSTEMS ENGINEERING, which he later sold and was taken on as an employee by the purchaser.

3. Prior to the divorce, Plaintiff's income was in excess of \$100,000.00.

4. At the time of the divorce, Plaintiff's income was zero, having terminated any employment.

5. At the time of the divorce, based on Plaintiff's ability to generate income, the Court estimated an income for Plaintiff of at least historically \$54,000.00 minimum. An alimony order of \$200.00 per month was granted based on that projection and \$300.00 per month for child support for three (3) children was ordered.

6. The year following the divorce, or in or about December 1986, Plaintiff purchased INTEGRATED SYSTEMS ENGINEERING himself and currently is the sole owner of INTEGRATED SYSTEMS ENGINEERING.

7. Plaintiff's net worth as of September 1988, was approximately \$1,157,000.00.

8. Although Plaintiff represented on a financial statement to Zion's First National Bank dated September 15, 1988, that his annual income was \$130,000.00 per year, Plaintiff testified at trial that his annual income was actually only \$72,000.00. The court recognizes that financial statements submitted to banks for purposes of loans are probably inflated and that financial statements submitted to the Court in divorce actions are probably deflated and that Plaintiff's income is somewhere in between those two figures. The court, however, declines to establish an exact income figure.

9. It does not appear simply to be coincidental that Plaintiff's income the year before his divorce was in the \$100,000.00 plus range annually and no income at the time of the divorce, and then two years later his income is again in the \$130,000.00 range, or at least so reflected on the statement submitted to the bank in September of 1988.

10. The Court finds that in any event there is a substantial and material change of circumstances in that Defendant's income has increased substantially from the time of the divorce, sufficient to warrant a modification of the decree and to grant Defendant's Petition.

11. The child support as previously ordered of \$200.00 per month per child shall be modified and increased so that Plaintiff shall pay \$700.00 per month per child for child support payments.

12. Although the Court is not specifically following the established child support guidelines, the Court feels this is equitable taking into account the debt structure of INTEGRATED SYSTEMS ENGINEERING from where Plaintiff receives his income.

13. After taking into account as factors on alimony, Plaintiff's increased ability to provide the standard of living that is now compatible with his income, taking into account those factors listed in the ENGLISH case, the JONES case, and the NELSON case, and taking into account the Court's attempt to maintain as close as possible the same standard of living at this time as was available at the time of the divorce and an ability at the present time for Plaintiff to

provide support, the needs of Defendant, and the ability of Defendant to provide her own support, the Court will, therefore, modify the Decree and increase the alimony award from \$200.00 per month to \$500.00 per month.

14. The Court finds that the \$4,000.00 paid by Defendant for curb and gutter assessments are the obligation of the Defendant as the owner of the home and are not the obligation of Plaintiff.

15. Defendant's counsel testified regarding attorney's fees, showing the time spent, the hourly rate charged, and the necessity of the number of hours spent in light of the difficulty of the case. It was stipulated by counsel for the Plaintiff that the rate charged was a reasonable one and was commonly charged for such actions in the community. The Court finds that Plaintiff's ability to pay attorney's fees is obviously much greater than that of Defendant, Defendant only having the income that she realizes from investment of funds she received from the divorce plus her child support and alimony. However, in checking over the exhibit provided by Defendant's counsel showing the amount of time spent, the court feels that there are some items that were not necessary; namely, concerning the costs of curb and gutter, the Court, therefore, finds that a reasonable award of attorney's fees to Defendant from Plaintiff is \$3,000.00, plus costs.

16. There having been no evidence regarding Plaintiff's Counterpetition, and a Motion to Dismiss the Counterpetition having been made by Defendant's counsel at the conclusion of Plaintiff's case and chief, and Plaintiff indicating his

intent to withdraw his Counterpetition, the Court finds that the Counterpetition should be dismissed.

17. The Court incorporates herein by reference such other facts and findings as are stated in the Memorandum Decision dated March 3, 1989.

From the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

1. There has been a substantial and material change in circumstances in Plaintiff's income and ability to provide child support and alimony from the time of the decree, and that said substantial and material change is sufficient to warrant a modification of the Decree of Divorce entered in this matter.

2. In view of the substantial and material change in circumstances, the court concludes that Defendant's Petition to Modify as to child support and alimony should be granted and that child support should be increased to \$700.00 per month per child and that alimony should be increased to \$500.00 per month.

3. The Court further concludes \$4,000.00 paid by Defendant for curb and gutter assessment is the obligation of Defendant as the owner of the property and, therefore, the obligation of the Defendant. Defendant's Petition as to said curb and gutter assessment should not be granted.

4. In view of the difference in earning ability and actual income received by both parties, Defendant has

sufficiently demonstrated the financial need for attorney's fees. The court concludes that \$3,000.00 is a reasonable amount for attorney's fees and that the number of hours spent were necessary in light of the difficulty of the case, the rate charged for attorney's fees was reasonable as stipulated by opposing counsel and is commonly charged for divorce actions in the community and that the award of attorney's fees is based on the need and results achieved in the case.

5. Plaintiff's Counterpetition should be dismissed.

6. The Order and Judgment entered in this matter shall be effective as of January 17, 1989.

7. The Court incorporates herein by reference such other conclusions of law as are stated in the Memorandum Decision dated March 3, 1989.

DATED this ___7___ day of ^{April} ~~March~~, 1989.

BY THE COURT:

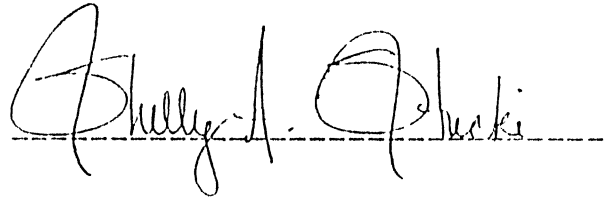
V. BY CHRISTOFFERSEN
Venoy Christoffersen
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of March, 1989, I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law and Notice to the foregoing persons, postage pre-paid thereon, by depositing in the United States Mail.

Richard B. Johnson
Attorney at Law
1327 South 800 East, Suite 300
Orem, UT 84058

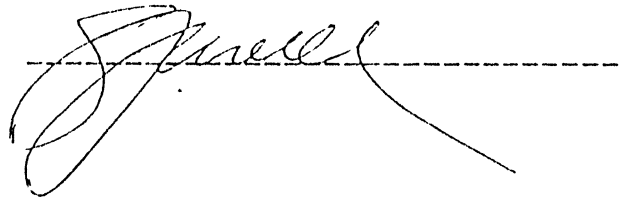
Brent W. Brown
1622 East 1080 North
Logan, UT 84321

A handwritten signature in cursive script, appearing to read "Shelly A. Perkins", written over a horizontal dashed line.

NOTICE

Counsel for Plaintiff is hereby notified that pursuant to Rule 4-504(2) of the Utah Code of Judicial Administration, counsel has five (5) days to submit any objections to the Court.

DATED this 30 day of March, 1989.

A handwritten signature in cursive script, appearing to read "J. Smith", written over a horizontal dashed line.

Stephen W. Jewell, 3814
Attorney for Defendant
15 South Main, Third Floor
First Security Bank Building
Logan, Utah 84321
Telephone: (801) 753-2000

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

BRENT "W" BROWN,

*

ORDER AND JUDGMENT

Plaintiff,

*

vs.

*

GERALDINE K. BROWN,

*

Civil No. 24569

Defendant.

*

This matter came on for hearing before the Court, the Honorable VeHoy Christoffersen presiding, on January 17, 1989, and again on February 28, 1989. Defendant was present and represented by counsel, Stephen W. Jewell. Plaintiff was present only on February 28, 1989, and represented by counsel on January 17, 1989, and February 28, 1989. The Court having heard the evidence and testimonies presented and the arguments of counsel, and being fully advised in the premises, and having previously entered its Findings of Fact and Conclusions of Law, now makes the following Order and Judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The First Cause of Action and Second Cause of Action in Defendant's Petition to Modify Decree of Divorce, regarding child support and alimony respectively, shall be and are hereby granted.

2. It is ordered that child support shall increase from \$300.00 to \$700.00 per month per child.

3. It is further ordered that alimony shall increase from \$200.00 to \$500.00 per month.

4. Said modified child support and alimony payments shall be paid effective as of January 17, 1989, and Defendant is granted a judgment against Plaintiff for all amounts owing from that date to the date of this order.

5. The Third and Fourth Causes of Action in Defendant's Petition to Modify Decree of Divorce regarding road assessments and withholding of child support and punitive damages shall be and are hereby denied.

6. Defendant shall be and is hereby awarded a judgment against Plaintiff as and for attorney's fees in the amount of \$3,000.00.

7. All other provisions of the Decree entered previously in this action shall remain as stated.

8. Plaintiff's Counter-Petition is denied and the same shall be and is hereby dismissed.

DATED this 17 day of ^{April}~~March~~, 1989.

BY THE COURT:

VENOY CHRISTOFFERSEN

VeNoy Christoffersen
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of March, 1989, I mailed a true and correct copy of the foregoing Order and Judgment and Notice to the foregoing persons, postage pre-paid thereon, by depositing in the United States Mail.

Richard B. Johnson
Attorney at Law
1327 South 800 East, Suite 300
Orem, UT 84058

Brent W. Brown
1622 East 1080 North
Logan, UT 84321

/ s/ _____

NOTICE

Counsel for Plaintiff is hereby notified that pursuant to Rule 4-504(2) of the Utah Code of Judicial Administration, counsel has five (5) days to submit any objections to the Court.

DATED this 28th day of March, 1989.

/ s/ _____